



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 718

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (473647) dated May 20, 2022 (issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: In person

Hearing date: March 15, 2023

Hearing participants: Appellant

Decision date: May 18, 2023

File number: GE-22-2077

Decision

[1] **I'm allowing the Claimant's appeal.** This decision explains why.

[2] The issue before me is the Claimant's **availability for work**. That's the issue that the Canada Employment Insurance Commission (Commission) reconsidered after learning of his diagnosis with a progressively debilitating medical condition.

[3] I find the Claimant was **capable of and available for work** and unable to find a **suitable** job given that work is only suitable if your health and physical capabilities allow you to perform it.

Overview

[4] The Claimant **applied for Employment Insurance (EI) regular benefits** on September 29, 2020. The Commission paid him 49 weeks of regular benefits.

[5] The Claimant applied for EI sickness benefits a year later, on September 6, 2021. That's when he said he hadn't been as capable of working as he'd been before his diagnosis in March 2021. He also applied for CPP and was approved in October 2021.

[6] On November 22, 2021, the Commission called the Claimant to ask about his diagnosis. It then went back and **converted his regular benefits to sickness benefits** on the grounds that he hadn't been capable of working. On March 5, 2022, it decided that he could get 15 weeks of sickness benefits from January 3, 2021, until April 17, 2021. It said he'd have to repay \$10,000 in regular benefits paid after that date.

[7] On March 4, 2022, the Claimant **asked for a reconsideration of the decision to change his claim from regular to sickness benefits**. The reconsideration decision is dated **May 20, 2022**. He says **he'd been capable of working** as long as he could sit rather than stand. He says he'd been confused between regular and sickness benefits.

[8] The Commission **now says** sickness benefits should start on March 14, 2021, and a disentitlement as of June 27, 2021. It says the issue before me is sickness benefits.

The issues I must consider

[9] Is the issue before me **availability for work** or **sickness benefits**?

[10] Was the Claimant **capable** of work, and when?

[11] If he was capable or working, did he show that he was **available** for work?

Analysis

My jurisdiction

[12] I only have jurisdiction to consider an issue if the Commission has already **reconsidered** it.¹ So, I must look at what's in a reconsideration decision to find the issue.

[13] The Claimant says he asked the Commission to reconsider its decision to change his regular benefits to sickness benefits over concerns that he wasn't available for work. The reconsideration decision of May 20, 2022, says it's about "**Availability for work**"

[14] But in submissions prepared for this appeal, the Commission says its reconsideration decision should have said "**Sickness benefits.**"

[15] So, the parties dispute which issue is before me.

[16] For the following reasons, I find it more likely than not that the reconsideration decision gives me the jurisdiction (authority) to consider the issue of **availability**:

- Although the Commission hasn't provided its initial decision on availability, it paid 49 weeks of regular benefits. So, it must have made an initial decision on availability.
- The Commission's decision to retroactively convert the claim from regular to sickness benefits was based on availability for work. It converted the claim due to concerns over the Claimant's **capability**, which is part of the **availability** test.
- The Claimant **specifically asked** for reconsideration of the Commission's conversion of his claim from regular to sickness benefits. His request **doesn't mention** payment of sickness benefits, as the Commission argues.

¹ See section 113 of the *Employment Insurance Act* (EI Act) and *DS v Canada Employment Insurance Commission*, 2020 SST 773.

- The reconsideration decision is dated May 20, 2022. It's about one issue only: **Availability for work**. That's the only reconsideration decision letter on file.
- The file includes an **initial decision letter** dated March 5, 2022, on **sickness benefits** but **no reconsideration decision** letter. There's no record that the Commission communicated a reconsideration decision on sickness benefits to the Claimant verbally either. I can only consider an issue that's been reconsidered.
- In its submissions, the Commission says it "**believes that the initial decision [on sickness benefits] should be modified,**" to start those benefits on March 14, 2021, instead of January 3, 2021. Suggesting a modification is not a reconsideration decision. The Commission didn't attend the hearing, so this suggestion is the only support for its argument that the issue I must consider is sickness benefits.

[17] That's why I don't agree with the Commission that the issue before me in this appeal is sickness benefits.

[18] So, I find that **the only issue I have jurisdiction to consider is whether the Claimant was available for work** from January 3, 2021, until September 4, 2021. I'll now consider that issue.

Availability for work

[19] The law says you must prove that you're **capable of and available for work and are unable to find a suitable job.**² I'll look at capability first.

[20] The Claimant reports that he was diagnosed in March 2021 with a serious degenerative condition that had begun to limit his walking. By September 2021, his condition had worsened. He says he applied for sickness benefits at that time since he could no longer work regularly. He argues that this is when he reported that **he'd not been as capable of working as before**, starting in March 2021. He says that's why he also finalized his application for CPP disability benefits in September 2021.

² This wording is set out in section 18(1)(a) of the EI Act.

[21] The Claimant's disclosure of his medical condition resulted in a Commission investigation in November 2021 into the regular benefits that had recently ended. A "Integrity Services Investigator" called him. He says the call came through from a blocked number, so he thought it was a crank call.³ He continued to doubt who the caller was after the questions began. He says the records of the conversation aren't correct. He says his memory was foggy at the time due to all the medications he had to take.

[22] **The Commission says** the Claimant hadn't been available for work in February and March 2021 because he said he'd been hospitalized. **He says** he meant that he had hospital appointments, He disputes that he'd been admitted to hospital.

[23] The Claimant says he sent no supporting documents at the time since he couldn't tell if the investigation was authentic or a scam. He argues that he received no letter from the Commission to say it was converting his regular benefits to sickness benefits. He says he only discovered this when a Notice of Debt arrived in March 2022 for \$10,000.

[24] I've based my findings below on **the credibility of the Claimant**, who spoke in an open and direct way about his condition and the limitations it has placed on him. He came to his in-person hearing at great personal cost despite walking and breathing difficulties. His voice was so faint that I sometimes found it hard to understand him.

[25] I find it more likely than not that the Commission's officer would have had similar difficulties when speaking to the Claimant by phone on November 22, 2021. I've had the benefit of talking to the Claimant in person, which is usually easier than over the phone.

[26] This type of communication barrier might explain the officer's conclusion that the Claimant **couldn't have been capable of any work** due to his diagnosis. That's despite him maintaining **throughout the hearing** that he'd been available for "light duty work" that allowed for his physical limitations. The records of that call don't show much discussion of what **suitable** or **light** work would have been in the Claimant's case.

[27] I also give less weight to the Commission's arguments for the following reasons:

³ Many Commission staff members worked from home during COVID using their own phones, which is why a government department wouldn't have come up as the caller.

- The Commission says the Claimant **initiated** a conversion of his regular benefits to sickness benefits. He denies this and I accept his denial. I find it more likely than not that he **didn't ask** for something that would put him in debt, especially at a time when he was dealing with a devastating diagnosis. I accept that he was acting in good faith, trying to ensure that his paperwork was correct.
- **Records of the Commission's call** suggest it may have relied, at least in part, on the wrong CPP application year (**2020** rather than **2021**) when assessing the Claimant's capability for work. **The officer cited both years**. The Claimant says he applied for CPP in September **2021**. The Commission says he was approved in October **2021**. Backdating the start of his physical limitations to **2020** would, more likely than not, have skewed assessment of when he stopped being able to work.
- I've noted the **inconsistencies in the Claimant's statements** during the above call. He disputes the way the Commission documented them. The Commission didn't provide a recording of the call so I can't verify that its summary is correct. Regardless, I find that the Claimant's inconsistencies need to be viewed in the context of his medication usage at the time and his confusion over the questioning. **So, I prefer his sworn, consistent testimony during his in-person hearing.**
- The Commission's officer suggested contacting the Claimant's social worker. This suggests the officer realized that the Claimant was confused by the conversation and was having trouble remembering key facts and dates. The Commission gives no indication if it spoke to the social worker and, if so, the results of that exchange.

[28] These irregularities and omissions are why I've given more weight to the Claimant's arguments on the following questions:

Was the Claimant capable of working starting on January 3, 2021?

[29] I find it more likely than not that the Claimant was capable of working starting on January 3, 2021. Although the Commission didn't provide his claim reports, it doesn't dispute that he reported his capability when filing his biweekly claims. He must have satisfied the Commission on this point, or it wouldn't have paid him regular benefits.

[30] The Commission hasn't explained why it initially picked January 3, 2021, as the date to convert the Claimant's regular benefits to sickness benefits when it knew he was only diagnosed in March 2021. As noted above, this suggests that it backdated the start of his difficulties working to October 2020, despite his repeated statement that he could still work.

[31] But I accept the Claimant's sworn testimony that he was capable of work from January to March 2021, and that he'd had appointments at a hospital, rather than in-patient stays. I accept that his medication may have blurred his memory of exact dates.

Was the Claimant capable of working from March 5, 2021, until his claim ended?

[32] I find it more likely than not that the Claimant was still capable of working after his diagnosis in March 2021, if he could work seated instead of standing. I accept his testimony that his medical condition didn't prevent him from working **with physical limitations** from March 5, 2021, until his claim for regular benefits ended in September 2021. The Commission dismissed this possibility, but I've accepted it.

[33] Now that I've accepted his capability for work, I'll apply the test for **availability**.

[34] I'm using the test below because the Commission disentitled the Claimant to regular benefits under a specific section of the law that looks at availability.⁴ The Commission made no submissions on whether the Claimant made reasonable and customary efforts to find work. So, it hasn't shown that it disentitled the Claimant from receiving regular benefits under the section of the law that deals with those efforts.⁵

[35] Under the availability test, the Claimant had to prove the following three things:⁶

- i. He wanted to return to work as soon as a **suitable** job was available.
- ii. He made enough efforts to find a **suitable** job.
- iii. He didn't set **personal conditions** that might **unduly** limit his chances of returning to work.

⁴ See section 18(1)(a) of the EI Act. *The Employment Insurance Regulations* (EI Regulations) offer a list of job-search activities that I can refer to, but the list is for guidance only when considering section 18(1)(a).

⁵ See section 50 of the EI Act.

⁶ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. In this decision, I paraphrase the three factors in plain language.

[36] When I consider each of these factors, I must also look at the Claimant's attitude and conduct.⁷

– **Wanting to go back to work**

[37] I accept the Claimant's sworn testimony that he wanted to go back to work as soon as a suitable job was available. I've already found his sworn testimony credible.

[38] The Claimant has a history of working. Wanting to continue working despite his physical limitations shows a strong work ethic. I've given weight to this factor since the relevant case law says attitude and conduct are important when deciding availability.

– **Making efforts to find a suitable job**

[39] I find that the Claimant made enough efforts to find a **suitable** job given that suitable work in his case excluded work where he'd have to stand or move around.

[40] The Commission hasn't shown that it considered what **suitable** work was in the Claimant's case. It appears to have concluded that he'd not been available for **any** work due to his physical limitations.

[41] The law says work is only **suitable** if the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work.⁸

[42] The Claimant says by March 2021, he had to start limiting his job search to work where he could sit down while working. He says **suitable** work in his case included clerical work such as data entry. He says he'd done this type of work before. His most recent job had been as a locker room attendant, which had involved a lot of standing.

[43] So, the Claimant argues that **he'd made efforts to find jobs that accommodated his physical limitations**. He says he used an employment agency for his job search. I find that not being able to remember the name of the agency does not negate the reliability of his testimony given the passage of time since that interaction and his overall credibility.

⁷ Two decisions from case law set out this requirement: *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

⁸ See section 9.002(1)(a) of the EI Regulations.

[44] I find that dealing with an employment agency that understood his physical limitations and could match him with supportive employers was probably the Claimant's best chance of finding a suitable job. Going through an agency shows that he tried to find work despite restrictions on the type of job he could accept.

[45] So, I find that the Claimant made enough efforts to find work that was **suitable in his case**. Having physical limitations doesn't necessarily stop a person doing **any** work.

– **Unduly limiting your chances of returning to work**

[46] The Claimant didn't set a **personal** condition on the jobs he'd accept that **unduly** limited his chances of returning to work.

[47] Having **physical limitations** on the type of job you can manage isn't a personal condition, as long as you don't set **additional** restrictions that stop you being available for **any** work.⁹

[48] The Claimant had physical restrictions that meant he had to work sitting down. He says he could have done those jobs. And those jobs usually exist. So, he wasn't **unduly** limiting his chances of returning to work by only focusing on the jobs he could manage.

– **So, was the Claimant capable of and available for work?**

[49] Based on my findings on the above three factors, I find that the Claimant has shown he was **capable of and available for work** and unable to find a **suitable** job.

Conclusion

[50] Since Claimant has shown that he was capable of and available for work from **January 3, 2021, to September 4, 2021**, he **isn't disentitled** from receiving the regular benefits he was paid during those months. Since he wasn't overpaid benefits, he has no debt to repay. This explains why **I'm allowing the Claimant's appeal**.

Lilian Klein

Member, General Division – Employment Insurance Section

⁹ See *SA v Canada Employment Insurance Commission*, 2020 SST 524.